UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLORADO SYMPHONY ASSOCIATION

and **Case Nos.** **27-CA-140724**
27-CA-155238
27-CA-161339
27-CA-179032

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO/CLC

RESPONDENT COLORADO SYMPHONY'S REPLY TO AMERICAN FEDERATION OF MUSICIANS' ANSWERING BRIEF

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INTRODUCTION

On February 14, 2017, ALJ Carter issued his Decision and Recommended Order ("Decision") finding that CSA violated the Act. On March 14, 2017, the Colorado Symphony Association ("CSA") filed a Statement of Exceptions ("Exceptions") and Brief in Support of Exceptions ("Brief"), which argued the Decision must be reversed because ALJ Carter made erroneous credibility findings, erred in applying the relevant law, and, in some cases, completely disregarded governing legal precedent.

On April 11, 2017, the American Federation of Musicians ("AFM") filed an Answer to CSA's Exceptions ("AFM Answer").[1] AFM's Answer only addresses two issues: (1) whether its request for information sought relevant information, and (2) whether CSA's implementation of its June 23, 2014 proposal was privileged by the AFM's bad faith. AFM's Reply is little more than a reiteration of its view of its authority and position in the music industry. AFM's lengthy discourse regarding its preeminence is unworthy of a response and CSA, therefore, limits this Reply to only the narrow legal issues addressed by AFM. Ultimately, AFM's Answer does nothing to undermine the deficiencies in ALJ Carter's Decision and the Decision must be reversed.

ARGUMENT

A. AFM's Request Did Not Seek Relevant Information.

ALJ Carter's only conclusion regarding the relevance of the information sought by AFM was that the information was relevant "to gain a better understanding of, and formulate responses to, the CSA's June 2014 contract proposal and the CSA's underlying plans to do more media

[1] Also on April 11, 2017, the CGC filed an Answer to CSA's Exceptions ("CGC Answer"). CSA files a separate Reply which addresses the CGC's Answer.

projects under terms that differed from the IMA." 55 ALJD 4-41; 56 ALJD 1-2. AFM cites this statement from ALJ Carter. AFM Answer, p. 18. Then, AFM spends the next 18 pages of its Answer discussing the myriad of reasons it believes its request sought relevant information. AFM Answer, pp. 17-35. AFM, however, is not permitted to prop up ALJ Carter's Decision based on reasoning he did not apply and analyses he did not make. The question is not whether AFM can develop *post hoc* arguments as to why its request sought relevant information, but whether ALJ Carter properly found the information was relevant. The Board should ignore AFM's arguments in their entirety.

AFM's monologue also ignores its overall course of conduct surrounding its information request. On several occasions, AFM representatives, including its bargaining representatives, stated it would not negotiate with CSA regarding its ability to perform commercial media projects. For example, AFM representatives made the following statements:

- Hair told Vriesenga AFM would not offer CSA anything other than the results of the EMA negotiations. Tr. 589:6-14.

- In February 2014 Gagliardi[2] expressed AFM's unwillingness to permit CSA to perform commercial projects outside the scope of the Commercial Agreements and stated, "if you think your little Colorado orchestra is going to get into this recording business . . . you're going to be in for a surprise." 12 ALJD 39-47; 13 ALJD 1-6; Tr. 591:12-25; 592:1-25. 593:1-12.

- During the parties' August 20, 2014 meeting AFM's representatives – Blumenthal and Newmark – stated they would not negotiate and, in fact, did not have the authority to negotiate, with CSA regarding its ability to perform commercial work. Tr. 472:25; 473:1-13; 717:21-25; 729:2-17.

[2] As discussed in the Brief, although ALJ Carter found Gagliardi made such comments to Vriesenga, he disregarded the weight of these statements because Gagliardi was not directly involved in bargaining with CSA. *See* 13 ALJD 2-6; 61 ALJD fn. 45. Gagliardi, however, was significantly involved in AFM's dealings with CSA as he was copied on several letters and attended the August 2014 breakfast with Bartels. Tr. 1523:6-19; R. Ex. 1. Moreover, and more broadly, Gagliardi is an AFM Executive Committee Member and, as such, his statements were made on behalf of AFM.

- In late August 2014, Hair, along with Newmark, Blumenthal, Gagliardi, and Comerford met with Bartels and explicitly stated that AFM would not negotiate with CSA regarding its interest in performing commercial work. Tr. 1524:23-25; 1525:1-25; 1526:1-3; 1547:3-19.

- Newmark stated in her bulletin regarding the EMA IMA that AFM would not "allow orchestra institutions to steal work from commercial recording musicians or to undercut [AFM's] existing agreements." 26 ALJD 1-12; R. Ex. 8, p. 2. Instead, AFM requires that orchestras agree "with the Federation's terms to put a fence around the commercial work so the IMA could not be used to undercut other Federation agreements." *Id.*

- In March 2015, Hair specifically told Kern that AFM was "not going to negotiate any of the commercial activities." Tr. 1470:13-24.

Information related to "CSA's media proposal and media plans," GC Ex. 28, p. 1, cannot be relevant when AFM had no intention of negotiating regarding such media plans.

Moreover, many of AFM's requests sought information regarding projects that had already been completed. For example, AFM's June 2015 request sought information related to CSA's past projects. 33 ALJD 1-18. Similarly, AFM's June 16, 2016 information request sought information relating to projects that occurred in 2015. 57 ALJD 27-38; 57 ALJD 28-30; 58 ALJD 1-8. Information relating to CSA's *past* projects has nothing whatsoever to do with CSA's proposal. At most, this information was sought as a discovery mechanism to prosecute a grievance alleging CSA failed to properly compensate employees under the IMA. This conclusion is consistent with the CGC's argument that the information was sought to determine whether CSA complied with the IMA and "calculate[d] the wages owed under the expired IMA status quo." CGC Answer, p. 45. AFM may not utilize an information request as a discovery tool. *See Unbelievable, Inc.*, 318 NLRB 857, 877 (1995) ("even if the material would be producible for collective-bargaining . . . it is not producible as a substitute for discovery."); *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992). Thus, the information sought by the Union was not relevant.

AFM's efforts to counter CSA's arguments relating to the financial nature of the requested information similarly fail. First, AFM conclusorily states that ALJ Carter did consider the financial nature of the requested information. AFM Answer, p. 33. AFM does not cite any portion of ALJ Carter's Decision for that conclusion, however. Nor could it; ALJ Carter's holding regarding the relevance of the requested information had nothing whatsoever to do with the financial nature of the requests. 55 ALJD 39-40.

AFM also attempts to characterize its request for financial information as relevant because it was not seeking CSA's general financial data and CSA made the request relevant by effectively asserting an inability to pay the wages in the IMA and other Commercial Agreements. AFM Answer, p. 33, fn. 27. AFM, however, ignores the fact that it did not make any proposal until the lunch meeting in March 2015 and, as such, its July 18, 2015 request for financial data was served before any offer was made. Indeed, at the time AFM served its July 2015 request, AFM and CSA had not yet met, AFM had not yet made a proposal, and CSA had not claimed it was unable to afford any financial proposal by AFM. Tr. 428:21-25; 429:1-1-7. Similarly, during the June 2015 negotiations, CSA did not state it was *unable* to afford AFM's June 3, 2015 offer. At most, CSA's representatives stated it was suffering from general economic difficulties and a competitive disadvantage, which is why CSA sought greater flexibility in its ability to perform commercial work. Such a statement indicates CSA's *unwillingness* to pay, not an inability to pay. *See Lakeland Bus Lines, Inc. v. NLRB.*, 347 F.3d 955, 961 (D.C. Cir. 2003) (unwillingness to pay does not trigger an employer's duty to disclose financial information). Accordingly, AFM was not entitled to the information it sought.

AFM's explicit statements that it would not negotiate with CSA regarding its interest in performing commercial media projects coupled with the fact that much of the information it

sought was either financial or related to CSA's *past* projects, belies ALJ Carter's conclusion that AFM needed the information to prepare a counterproposal.

B. CSA's Implementation Of Its Proposal Was Privileged By AFM's Bad Faith.

AFM's Answer regarding CSA's implementation follows the same tack as its other arguments: it ignores bad facts, mischaracterizes the evidence, overstates its conduct, and slings mud at CSA in an effort to distract the Board from its own misconduct. As noted above, much of AFM's Answer is unworthy of a response and, as such, CSA only addresses a couple of AFM's shortcomings in this Reply in an effort to place AFM's allegations in full context of the record. CSA need only address a few of the glaring shortcomings in AFM's arguments in order to demonstrate the insufficiency of AFM's position.

AFM proclaims it acted in good faith once it received CSA's June 2014 offer because it "proceeded to schedule negotiations with CSA." AFM Answer, p. 38. AFM, however, ignores the fact that it scheduled negotiations at CSA's insistence and, ultimately, sent representatives who did not have the authority to negotiate regarding Commercial Agreements and who only used the August 2014 meeting as a question and answer session.[3] Tr. 232:23-25; 233:1-4; 255:25; 256:1-9. As the D.C. Circuit has explained,

> The Guild does not appear to have done anything at these negotiation sessions but ask questions. The truth of the matter, which the record clearly reveals, is that the Guild's unit was unalterably opposed to the merit pay proposal from the outset and continuing up to the employer's implementation – not to the details, but to the very concept. There was no evidence that the Guild was prepared to engage in real negotiations on the employer's proposals.

[3] AFM attempts to distract the Board from the fact that it did not attend the session in good faith to negotiate a new agreement, but rather, attended only to ask questions by claiming those questions were relevant. AFM Answer, pp. 45-46. This argument misses the mark. AFM is not permitted to use the bargaining session to only ask questions. *See Detroit Typographical Union No. 18 v. N.L.R.B.*, 216 F.3d 109 (D.C. Cir. 2000).

216 F.3d at 119. The Court also found that if the union "really had wished to bargain on merit pay they had plenty of time to indicate that to the News. Asking questions was not enough." *Id.* at 120. The same is true here; the undisputed evidence demonstrates AFM was not prepared to engage in real negotiations on CSA's proposals relating to commercial projects. Rather, AFM wanted to use the August 20, 2014 meeting as an information gathering session. AFM's questions during that meeting are not sufficient.

AFM also asserts that Blumenthal's admission that he did not bargain the AFM's Commercial Agreements is "true, but irrelevant." AFM Answer, p. 42. AFM's assertion paints too narrow a view of this issue. It is absolutely relevant that Blumenthal did not bargain AFM's Commercial Agreements; this evidence is yet another example of AFM's separation of commercial and symphonic media. Indeed, AFM's representatives have specifically referred to this division as a "fence." R. Ex. 8, p. 2. There is no reason to believe – and no evidence to suggest – that Blumenthal, a member of AFM's Symphonic Media Division, could have negotiated regarding CSA's performance of *commercial* media, a division in which he is not a part and has no authority. This conclusion is confirmed by Newmark's testimony that she and Blumenthal did not attend the August 2014 bargaining session prepared to discuss CSA's ability to perform commercial media projects. Tr. 472:25; 473:1-25; 474:1-18.

AFM attempts to undermine this conclusion by stressing Blumenthal's self-serving testimony regarding his authority to bargain separate rates for commercial work with CSA. AFM Answer, pp. 43-44. Blumenthal's assertion, however, is incredible in light of Hair's testimony regarding his ongoing negotiations for the Commercial Agreements. During the entire period of events underlying this matter (October 2013-June 2015), AFM was negotiating its Commercial Agreements, including the Motion Picture Agreement, Live Television Agreement,

the Commercial Announcements Agreement, Cable Television Agreement, and the Sound Recording Labor Agreement. Tr. 824:8-15; 825:1-25; 826:1-25; 827:1-24; 828:1-4. Hair was the chief spokesperson for those "open" negotiations. *Id.* The fact that AFM was simultaneously negotiating the Commercial Agreements belies AFM's argument that Blumenthal could have negotiated with CSA regarding its ability to perform commercial projects. Indeed, it is nonsensical for AFM to insist it permitted two separate bargaining teams to make separate offers regarding the same scope of work. Simply stated, it is inherently incredible that AFM would permit Blumenthal to offer favorable commercial rates to CSA while Hair sat at the table with its commercial bargaining partners. It is also inconsistent for Hair to both testify he did not want to simultaneously negotiate with EMA and CSA regarding the IMA because it would be too "confusing" and "detrimental," but that Blumenthal could have negotiated with CSA regarding matters covered by the Commercial Agreements at the same time those Agreements were being negotiated by Hair. Tr. 771:25; 772:1-14.

When viewed as part of a larger course of conduct, rather than a narrow piece beginning in July 2014, as AFM attempts, it is clear AFM's conduct on August 20, 2014 was bad faith. Indeed, AFM's bad faith conduct at that time coupled its overall course of conduct for more than 12 months compels the conclusion that CSA was privileged to implement its proposal. In sum, AFM explicitly delayed bargaining for more than eight months and told CSA it would not meet unless it joined the multi-employer group. Then, in response to CSA's overtures and repeated attempts to meet individually with AFM, AFM changed course and, instead of flatly refusing to meet with CSA, AFM began delaying and avoiding good faith discussions. Then, once AFM agreed to meet, it only made itself available for little more than two hours, did not come prepared to make a proposal, sent representatives who did not have the authority to make a proposal, and

used the meeting as nothing more than a question and answer session. Following the August 20, 2014 meeting, Bartels reported to Kern that Hair stated during their breakfast that AFM would not negotiate with CSA regarding commercial media projects. ALJD 23 30-33, fn. 21. Thus, for a twelve month period, AFM engaged in a pattern of bad faith bargaining and repeated refusals to negotiate with CSA about CSA's performance of commercial media projects. And, CSA in good faith believed AFM was outwardly stating it would not negotiate with CSA regarding its ability to perform commercial media projects. AFM's persistent delays and refusals to bargain permitted CSA to implement its proposal. ALJ Carter's Decision should be reversed.

CONCLUSION

Based on the foregoing, CSA requests that the Board reverse ALJ Carter's Decision.

Respectfully submitted this 25th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25th, 2017, a true and correct copy of the foregoing **RESPONDENT COLORADO SYMPHONY'S REPLY TO AMERICAN FEDERATION OF MUSICIANS' ANSWERING BRIEF** was E-filed with the NLRB E-Filing System and served via email to the following:

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